

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In re:

CORD, HENDRIK L., JR. a/k/a
CORD HANK L., JR. and
CORD, KATHERINE E.,

Case No. 01-20256
Chapter 11

Debtors. _____/

HENDRIK L. CORD, JR.,

Plaintiff,

vs.

Adv. Proc. No. 04-281

SKINNER NURSERIES, INC.,

Defendant. _____/

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

(Doc. Nos. 12 and 13)

The matter under consideration in this Chapter 11 case is a Complaint filed by Hendrik L. Cord, Jr. (Debtor), naming Skinner Nurseries, Inc. (Skinner) as defendant seeking money damages, including punitive damages, attorneys' fees and costs pursuant to 11 U.S.C. § 525(b).

The Debtor in his Complaint contents that he was in search of a job when he received an offer of employment from Skinner, which the Debtor accepted. The offer provided for a base annual salary of \$55,000 plus a bonus of 30%. In

addition, the offer included certain fringe benefits. As part of the application process, the Debtor was required to furnish a credit report and the Debtor, according to the Complaint, anticipating that the credit report would disclose both his personal and corporate bankruptcy cases, did provide the information to Skinner and upon receipt of that information, Skinner withdrew the offer of employment.

It is the contention of the Debtor that based upon Section 525(b) of the Code, Skinner is prohibited from terminating the employment of, or discriminating with respect to employment against the Debtor because he was in bankruptcy. Based upon the foregoing that the Debtor contends that he is entitled to the relief he seeks.

Skinner, in due course filed its Answer, generally denying and admitting the allegations set forth in the Complaint and asserting two affirmative defenses. First, that there was no employment relationship and therefore, the Debtor's complaint fails as a matter of law and second that the Debtor failed to mitigate his damages.

The matter is presented for this Court's consideration by way of Plaintiff's Motion for Partial Summary Judgment (Doc. No. 13) filed by the Debtor and Defendant Skinner Nurseries, Inc.'s Motion for Summary Judgment

and Supporting Memorandum of Law (Doc. No. 12) filed by Skinner. Both the Debtor and Skinner agree that the following facts are without dispute and according to the Motions, each is entitled to a judgment in their respective favors as a matter of law.

These facts may be summarized as follows. Skinner is a landscape supplier for landscape construction and architecture with locations in Florida, Georgia, Texas, and South Carolina. In October 2003, the Debtor was interviewed for a position as a production manager for Skinner's anticipated opening of a growing operation in Humble, Texas. The Debtor was interviewed by Kevin Van Dyke, the chief operating officer of Skinner on October 17, 2003. During the interview, the Debtor discussed his decision to close down his own business but he did not inform Mr. Van Dyke the true reason for seeking employment, which was that his corporation was in bankruptcy.

On November 2, 2003, after the interview, Skinner issued a letter to the Debtor extending an offer of employment, which was an offer of employment "at will." On November 3, 2003, the Debtor sent an email to Mr. Van Dyke informing him of his personal and professional chapter 11 bankruptcies because he knew that the background checks that were being conducted would disclose this information. The Debtor in his email also stated that he wanted to clarify

an issue that he had stated in his resume but felt that it might be misunderstood. This was apparently a reference to the statement he made during the interview that he had obtained a bachelor's degree from Troy State University, which was in fact untrue and his email stated that he was in the process of completion for his studies for a bachelor's degree.

On November 3, 2003, Mr. Van Dyke responded to the Debtor by email and informed him that the disclosure of the Debtor's bankruptcy and his lack of degree were important factors in considering whether or not the Debtor would be hired. On November 5, 2003, the Debtor met with Mr. Hammersmith at the suggestion of Mr. Van Dyke for purpose of discussing his capability to serve as the production manager. Upon learning that the Debtor had not been truthful, the management decided to keep the offer of employment of the Debtor on hold and on November 5 or 6, 2003, the Debtor was informed that his employment was rescinded and therefore, he should not proceed with the required drug test. It further appears that on November 19, 2003, Skinner decided to halt the plan to develop the Humble Texas growing operation; thus, the result of the anticipated position for which the Debtor was interviewed no longer existed.

It is without dispute that the Debtor was never employed in the technical sense by Skinner; never performed any services for Skinner; never was paid by

Skinner; and his relationship with Skinner was limited to the stage of offer and acceptance of employment.

Obviously, the threshold question is whether or not the Debtor is covered by Section 525(b) of the Code, since this Court is satisfied that he was not, he has no viable claim under this Section.

It is well established now by several cases, that Section 525(b) of the Code applies only to actions taken after the an employment relationship has been established and does not cover a situation which might be a discriminatory hiring practice by private employers. Pastore v. Medford Sav. Bank, 186 B.R. 553 (D. Mass. 1995); Fioani v. Caci, 192 B.R. 401 (Bankr. E.D. Va. 1996); In re Hardy, 209 B.R. 371 (Bankr. E.D. Va. 1997).

In the present situation, it is true that an offer of employment was extended to the Debtor on November 2, 2003, and that the same was accepted by the Debtor on November 3, 2003. However, the fact remains that at that point in time, the relationship was merely an executory contract, which was notwithstanding the initial acceptance of the offer made by Skinner, still remained so far, unperformed that was subject to rejection. Skinner in its response also contends that even assuming without conceding that for the purposes of Section 525(b) of the Code, the Debtor can be considered to be an

employee, this record is clear that the reason for rescinding the offer of employment was not solely based upon the Debtor's bankruptcy but also his lack of candor concerning his claimed bachelor's degree, which he subsequently attempted to correct. It is clear that under the statute, bankruptcy must be the sole reason for the discriminatory treatment by an employer. *See Everett v. Lake Martin Area United Way*, 46 F.Wuupp2d 1233 (M.D. Ala. 1999); *Laracuente v. Chase Manhattan Bank*, 891 F.2 17 (1st Cir. 1989).

Based upon the foregoing, this Court is satisfied that the facts are without dispute and there are no genuine issues of material facts and Skinner is entitled to summary judgment in its favor as a matter of law. From this it follows that the Debtor's partial motion for summary judgment is not supported by existing law and therefore, should be denied.

Accordingly it is

ORDERED, ADJUDGED AND DECREED that the Plaintiff's Motion for Partial Summary Judgment (Doc. No. 13) be, and the same is hereby, denied. It is further

ORDERED, ADJUDGED AND DECREED that the Defendant Skinner Nurseries, Inc.'s Motion for Summary Judgment and Supporting Memorandum of Law (Doc. No. 12) be, and the same is hereby, granted. It is further

ORDERED, ADJUDGED AND DECREED that this Court shall enter a separate Final Judgment in accordance to the foregoing.

DONE AND ORDERED at Tampa, Florida, on October 14, 2004.

/s/ Alexander L. Paskay
ALEXANDER L. PASKAY
U.S. Bankruptcy Judge